

Commission to base its decision on the Section 22.921 construction which we had earlier and successfully argued to the Mobile Services Division. Ultimately, the Commission did so.

6. Consistent with the foregoing decision to attempt to narrow rather than broaden the issues, I decided we should not undertake to controvert the factual allegations made by the Settlement Group, but instead confine ourselves to disputing their significance when that seemed appropriate. In that connection, we presented no affidavits or declarations in support of any of our filings. In my view, TDS's case was best and most appropriately presented by focusing Commission attention on the narrow question of the meaning of Section 22.921, and refusing to become side-tracked into factual disputes. Additionally, because of the numerous facts and circumstances occurring over a number of years which might be relevant to any determination of the locus of *de facto* control of UTELCO, an operating telephone company, under the Commission's policies, it was my view that any attempt to dispute the Settlement Group's contention that TDS was in *de facto* control of UTELCO would require a full investigation and presentation of all of the factors.¹ In these circumstances, I decided that a full investigation of the facts relating to *de facto* control was neither necessary nor appropriate, and that we would not attempt to offer any factual presentations or argument concerning control. I take full responsibility for these tactical decisions, which in my view were mine to make, and which I made in what I considered an ethical and responsible manner.

7. In stating that TDS had a 49% minority interest in UTELCO, as we did several times in the various pleadings we filed, I believed it was true and thought it an appropriate thing to say. I took at face value the accuracy of the statements concerning that matter contained in UTELCO's routine filings with the Commission as well as in the Settlement Group pleadings.² However, in response

¹ Two facts of which I was aware were, first, that the optioned stock was held and voted by a trustee who was not a TDS employee, and second that the beneficiaries were approximately twenty individuals, most of whom were TDS employees.

² The UTELCO filings were neither prepared, reviewed in advance of filing, nor filed by my firm. To the best of my knowledge, UTELCO was represented for most matters by the law firm of Blooston, Mordkofsky, Jackson & Dickens (the "Blooston firm"), a law firm that also has
(continued...)

to the only argument actually advanced by the Settlement Group to the effect that the Bureau had been wrong in finding that TDS did not control UTELCO, we did not refer to that 49 percent interest or contend that TDS was not in control. We acquiesced in the Settlement Group arguments. Subsequent to the filing of the Settlement Group's instant Motion to Enlarge, I became aware that TDS had from time to time purchased shares of UTELCO's non-voting, non-convertible preferred stock and therefore that it has a 49 percent voting interest but a more than 49 percent equity interest. Had I been aware of the existence of that stock when drafting the pre-designation pleadings, I would have been more precise in my references to TDS's ownership interest in UTELCO.


Alan Y. Naftalin

August 25, 1994

²(...continued)

represented Century, although I understand that the Blooston firm is not representing Century or the Settlement Group in this proceeding due to the obvious conflict of interest such representation would involve.

ATTACHMENT 2

DECLARATION OF CHARLES D. METCALF

1. I, Charles D. Metcalf, under penalty of perjury, do hereby declare that the following declaration is true and correct to the best of my knowledge, information and belief.

2. I am the General Manager and President of UTELCO, Inc., and have served as General Manager of UTELCO, Inc. or its predecessor, United Telequipment Corporation ("UTELCO"), since July 1982. Since my appointment as General Manager, I have been in charge of UTELCO's day-to-day operations.

3. The attached document is an amendment to the Telephone Loan Contract between UTELCO and the United States of America, acting through the Rural Electrification Administration ("REA"), dated March 17, 1983. My understanding is that this amendment was necessitated by UTELCO's filing for reorganization in the United States Bankruptcy Court for the Western District of Wisconsin in 1982. In connection with the REA's approval of UTELCO's Plan of Reorganization, my understanding is that the REA received the right to approve any change in UTELCO's General Manager. My understanding of the effect of the attached amendment, which is still in effect, is that I cannot be replaced as General Manager of UTELCO without the approval of the REA. I was approved by the

REA as the General Manager of UTELCO during the course of UTELCO's bankruptcy.

Charles D. Metcalf

REA Project Designation:

WISCONSIN 576 MONROE

TELEPHONE LOAN CONTRACT AMENDMENT

Dated as of March 17, 1983

between

UNITED TELEQUIPMENT COMPANY

RURAL TELEPHONE BANK

and

UNITED STATES OF AMERICA

AGREEMENT, made as of March 17, 1983, pursuant to the Rural Electrification Act of 1936, as amended (7 U.S.C. 901 et seq., hereinafter called the "Act"), between UNITED TELEQUIPMENT COMPANY (hereinafter called the "Borrower"), a corporation existing under the laws of the State of Wisconsin, UNITED STATES OF AMERICA (hereinafter called the "Government"), acting through the Administrator of the Rural Electrification Administration (hereinafter called the "Administrator") and the RURAL TELEPHONE BANK (hereinafter called the "Bank"), a corporation existing under the laws of the Government acting through the Governor of the Bank (hereinafter called the "Governor").

WHEREAS, the Government and the Borrower have heretofore entered into a telephone loan contract, amending loan contract, consolidating telephone loan contract, or consolidating and amending telephone loan contract, dated as of February 10, 1959 (such agreement, as it may have been amended, being hereinafter called the "Loan Contract"); and

WHEREAS, the Bank was made a party to the Loan Contract in a Telephone Loan Contract Amendment, dated as of January 28, 1974; and

WHEREAS, pursuant to the Act and pursuant to the Loan Contract, the Government has made and guaranteed loans and the Bank has made loans to the Borrower; and

WHEREAS, the debt created by the Loan is evidenced by Notes; and

WHEREAS, the Borrower is in default of its Loan Contract and Mortgage, in several respects, including failure to duly and punctually pay the principal of and interest on the Notes; and

WHEREAS, the Government and the Bank notified the Borrower that all unpaid principal of and accrued interest on all Notes was accelerated; and

WHEREAS, the Government and the Bank now desire to reinstate such debt in accordance with a certain "Plan of Reorganization Under Chapter 11 of the United States Bankruptcy Code for United Telequipment Corporation"; and

WHEREAS, it is intended by this agreement to amend the Loan Contract in certain respects;

NOW, THEREFORE, for and in consideration of the mutual agreements herein contained and for such other good and valuable consideration, the Borrower, the Government and the Bank agree as follows:

1. The debt of the Borrower owed or guaranteed by the Government and owed to the Bank is hereby reinstated and the Borrower's Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code is approved by the Government and the Bank.

2. The Loan Contract is hereby amended by adding a new Article V thereto to read as follows:

Sec. 1. "Supervisor: Appointment and Powers." If, in the opinion of the Administrator or Governor, action is necessary to protect the Government's or Bank's security for the loan or is essential to achieve the objectives for which the loan is made, or if the Administrator or Governor shall, in their absolute discretion, determine it desirable, appropriate or necessary to ensure proper use of loan funds or of general funds of the Borrower, the Administrator or Governor may appoint, as the representative of the Government and Bank, a supervisor (hereinafter called the "Supervisor") for the System or such section or sections thereof as the Administrator or Governor shall designate, and notify the Borrower of such steps as deemed necessary to assure construction or operation of the System, in accordance with the loan contract, or such portion or portions thereof as may be designated by the Administrator or Governor, or to assure performance of any other obligations of the Borrower pursuant to the provisions of the Loan Contract, the Mortgage, or of the Notes.

The Supervisor shall have power to operate the System, and other property of the Borrower, and do all things reasonably incident to the exercise of the powers herein granted, including, without limitation directing the conservation of any funds of the Borrower, the collection of all debts due it, the payment of all expenses of the Borrower from any of its funds, the termination of the

employment of such employees of the Borrower as they shall determine upon and the employment of such persons, on such terms and conditions as he may designate, as they shall deem necessary to assist in carrying out their functions.

The salaries, fees, disbursements and expenses of any Supervisor who shall be an employee of the Government and the Bank, shall not be payable by the Borrower unless and to the extent that the Administrator and Governor, upon written notification to the Borrower, shall so require. So long as the appointment of the Supervisor shall be in effect, all checks, drafts, and orders drawn on any bank account maintained by the Borrower shall be countersigned by the Supervisor, except that if the proper officers or employees of the Borrower shall refuse to sign any such check, draft or order, the Supervisor shall have full power and authority to sign such check, draft or order for the Borrower without the requirement of any other signature thereon, if such check, draft or order is required to carry out the obligations of the Borrower hereunder. The Borrower hereby constitutes the Administrator and the Governor its agent, for the purpose of notifying any bank in which any account of the Borrower shall be maintained of the appointment of a Supervisor and of the provisions hereunder with respect thereto, and agrees that such notice shall include a direction to any such bank with respect to the signing or countersigning of the checks, drafts or orders drawn on any such account as in this section provided. The Borrower shall comply with all reasonable instructions of the Supervisor incident to carrying out the obligations of the Borrower hereunder or the performance of the functions of the Supervisor.

Sec. 2. "Manager". The Borrower will not at any time employ, or enter into any contract for the employment of, any general manager of the Borrower's System or any person exercising comparable authority to the manager, unless the employment or the contract shall first have been approved by the Government and the Bank. The Borrower shall not terminate the employment of the approved manager or person exercising comparable authority without the approval of the Government and Bank.

If, during such periods as the Borrower shall be in default of its Loan Contract or Mortgage, the Government or the Bank shall at any time give notice to the Borrower that in its opinion such System is not being efficiently operated and shall request the termination of the employment of the approved manager or person exercising comparable authority, or shall request the termination of any operating contract in respect of any such System, the Borrower will terminate the employment or operating contract within thirty (30) days of the notice. All contracts in respect of the employment of a manager or person exercising comparable authority, or for the operation of the System shall contain provisions to permit compliance with these covenants.

Sec. 3. "Additional Borrowing". The Borrower will not assume or otherwise become obligated or liable for any additional debt without the prior approval of the Government and the Bank.

Sec. 4. "General Funds Expenditures". The Borrower will not expend any funds in excess of \$25,000, other than to the Government and the Bank, without prior approval of the Government and the Bank. However, requests for approval of such amounts will be deemed approved by the Government and the Bank if the Borrower is not notified in writing to the contrary within thirty (30) days of receipt by the Government and Bank of the request.

Sec. 5. "Counterparts". This agreement may be simultaneously executed and delivered in two or more counterparts each of which so executed and delivered shall be deemed to be an original, and all shall constitute but one and the same instrument.

IN WITNESS WHEREOF the Borrower and the Bank have caused this agreement to be signed in their respective corporate names and their respective corporate seal to be hereunto affixed and attested by their officers thereunto duly authorized, and the Government has caused this agreement to be duly executed all as of the day and year first above written.

UNITED TELEQUIPMENT COMPANY

(Seal)

by

Attest:

President

Secretary

UNITED STATES OF AMERICA, and
RURAL TELEPHONE BANK, respectively

(Seal)

by

Attest:

Administrator
of
Rural Electrification Administration,
and as Governor of Rural Telephone Bank

Certificate of Service

I, Gayle C. Kosarin, hereby certify that on this 25th day of August, 1994, copies of the foregoing Opposition To Motion To Enlarge Issues were served via first class, postage-paid United States mail on the following:

*The Honorable Joseph P. Gonzalez
Federal Communications Commission
Common Carrier Bureau
2000 L Street, NW
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Washington, DC 20554

*Joseph P. Weber
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2000 L Street, NW
Suite 512
Washington, DC 20036


Gayle C. Kosarin

*By Hand

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of) CC Docket No. 94-11
)
TELEPHONE AND DATA SYSTEMS,) File No. 10209-CL-P-715-B-88
INC.)
)
For Facilities In The Domestic)
Public Cellular Telecommunica-)
tions Radio Service on Frequency)
Block B, In Market 715,)
Wisconsin 8 (Vernon) Rural)
Service Area)

To: The Honorable Joseph P. Gonzales
Administrative Law Judge

APPENDIX TO
OPPOSITION TO MOTION TO ENLARGE ISSUES

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ATTORNEYS FOR TELEPHONE & DATA
SYSTEMS, INC.

ATTORNEYS FOR UNITED STATES
CELLULAR CORPORATION, INC.

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by Century Cellunet, Inc., et al.

Tab 12

Reply to Opposition to Application for Review
filed on April 4, 1991
by Century Cellunet, Inc., et al.

Tab 13

Reply to Opposition to Contingent
Application for Review
filed on April 4, 1991
by Telephone & Data Systems, Inc.

Tab 14



RECYCLED

ED11

ALL-STATE LEGAL SUPPLY CO. 1-800-222-0510

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of)
)
TELEPHONE AND DATA) No. 10209-CL-P-715-B-88
SYSTEMS, INC.)
)
Application for construction)
permit to establish a new)
cellular system operating on)
Frequency Block B in the)
DPCRTS serving the Wisconsin)
8 - Vernon Rural Service Area)
(Market No. 715))

To: The Chief, Mobile Services Division
Common Carrier Bureau

PETITION TO DISMISS OR DENY

Century Cellunet, Inc. (Century), by its attorney and pursuant to Section 1.823(b)(2) of the Commission's rules and Section 309 of the Communications Act, 47 U.S.C. Sec. 309, hereby petitions the Federal Communications Commission to dismiss as defective, or deny on its merits, the captioned application of Telephone and Data Systems, Inc. (TDS). Century submits that the captioned application is defective within the meaning of Section 22.20 of the rules, 47 C.F.R. Sec. 22.20, and must accordingly be dismissed, because TDS has a prohibited cross-ownership in more than one application in the Wisconsin 8 - Vernon Rural Service Area in violation of Section 22.921(b) of the rules, and because TDS failed to timely disclose such prohibited cross-ownership as required by Section 1.65 of the rules. Either

violation by itself would be disqualifying; both together render it beyond reasonable dispute that the TDS application may not lawfully be granted. In support thereof, Century respectfully shows:

Standing

In the cellular lottery conducted by the Commission on March 15, 1989, the captioned application of TDS was selected for the wireline cellular frequency block in the Wisconsin 8 - Vernon Rural Service Area (the "Wisconsin 8 RSA"). See Public Notice Report No. CL-89-107, dated March 16, 1989; and Public Notice Report No. CL-89-174, dated June 9, 1989. Century also has pending before the Commission an application for authority to establish a new wireline cellular system to serve the Wisconsin 8 RSA, which is mutually exclusive with the captioned application of TDS. See Public Notice Mimeo No. 1297, dated January 19, 1989; and Public Notice Mimeo No. 1890, dated March 7, 1989.

In addition, Century and nine of the remaining wireline cellular applicants for the Wisconsin 8 RSA (i.e., all applicants with the exception of TDS, Ameritech Mobile Communications, Inc. and GTE Mobilnet Incorporated) are parties to a partial settlement providing for the formation of a partnership, to be named Wisconsin RSA #8 Partnership, to be the wireline cellular licensee in the event any of the parties to the settlement is selected in the lottery.

Favorable action on TDS' application thus would necessarily preclude Century from participating in the provision of wireline cellular service to the Wisconsin 8 RSA.

Under these circumstances, Century's status as an applicant for the Wisconsin 8 RSA clearly provides it with standing to file the instant petition. See, e.g., Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940); NBC v. FCC, 132 F. 2d 545, 548-549 (D.C. Cir.), aff'd 318 U.S. 239 (1943); Northco Microwave, Inc., 1 F.C.C. 2d 350 (1965).

Factual Background

As reflected in the attached Declaration of Fred Englade (Attachment A hereto), an agreement* was entered into prior to the FCC lottery on March 15, 1989 among fourteen wireline carriers to form the Wisconsin RSA #8 Partnership (the "Settlement Partnership") to jointly provide for the funding and provision of cellular service to the Wisconsin 8 RSA on the wireline frequencies. The Settlement Agreement was entered into by ten of the thirteen wireline cellular applicants for the Wisconsin 8 RSA,** as

* The Wisconsin RSA 8 Settlement Agreement (hereinafter the "Settlement Agreement"), annexed as Exhibit 1 to the Englade Declaration.

** TDS, Ameritech Mobile Communications, Inc. and GTE Mobilnet Incorporated elected not to participate. TDS actively participated in the negotiations which led to the

well as four additional wireline carriers with an exchange presence in the Wisconsin 8 RSA who did not file applications there.

As provided in the Settlement Agreement, in the event the application of any of the ten applicant-participants is selected in the lottery, the winning application will be amended to formally substitute the Settlement Partnership as the selectee. In substance, therefore, each of the participants in the Settlement Agreement holds a pro rata interest in each of ten applications for the Wisconsin 8 RSA, as expressly permitted under Commission policies for wireline carriers. See, e.g., Cellular Radio Lotteries (Order on Reconsideration), 101 F.C.C. 2d 577, 588 & Para. 21 (FCC 1985); 47 C.F.R. Sec. 22.23(b)(2).

However, one of the four additional exchange carriers admitted to the settlement group is UTELCO, Inc. (UTELCO). UTELCO is 49% owned by TDS* and, as a result of UTELCO's

Settlement Agreement, and the final language of the Agreement reflects changes expressly requested by TDS. As a result, the remaining parties thereto fully expected TDS to become a party to the Settlement Agreement prior to the lottery, but for undisclosed reasons TDS elected not to do so.

* UTELCO (f/k/a United Teleequipment Corporation) is wholly-owned by Monroe Communications (Monroe), which, in turn, is 49% owned by TDS. See FCC Form 430, filed March 18, 1988 (Attachment B hereto). TDS also holds an option to purchase the remaining 51% of Monroe and, hence, of UTELCO. See Form 490 application for FCC consent to the transfer of control of United Teleequipment Corporation to Monroe filed September 8, 1986, at Exhibits I & III. Both in the captioned application as filed (Exhibit No. 1, Attachment C at page 6) and as amended on April 17, 1989 (Exhibit No. 1,

entering into the Settlement Agreement, UTELCO also has a 7.143% (rounded) pro rata interest* in each of the ten participant-applicants' applications for the Wisconsin 8 RSA. Therefore, at the time the lottery for the Wisconsin 8 RSA was held on March 15, 1989, TDS not only held a 100% ownership interest in its own application, but also--through UTELCO -- TDS held the equivalent of a 3.5% interest in each of ten additional applications for the Wisconsin 8 RSA.** Despite this material change in its application from the time it was filed, TDS has never disclosed it to the Commission. TDS has failed to do so notwithstanding that it has twice amended its application (viz., on April 17, 1989 and again on June 29, 1989) subsequent to the lottery.

Argument in Support of Petition

Section 22.921(b)(1) of the rules explicitly provides, in pertinent part, that:

"No party to a wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, except that interests of less than one percent will not be considered."

Attachment B at page 6), TDS disclosed that UTELCO (United Telequipment Corporation) is an "affiliate" or "subsidiary" of TDS.

* Each participant in the Settlement Group has the equivalent of a one-fourteenth pro rata interest in each of the ten applications filed by members of the Settlement Group, which equates to a 7.143% interest.

** TDS' 49% of UTELCO's 7.143% equals 3.5%.

TDS' ownership of 100% of its own application and its prelottery acquisition (through UTELCO) of a 3.5% interest in the Settlement Group plainly violates the express terms of Section 22.921(b)(1), and thus renders TDS' application defective within the meaning of Section 22.20 of the rules. MV Cellular, Inc., 103 F.C.C. 2d 414, 418-420 (1986) (49% partnership interests in common in three applicants in the same market violated Section 22.921 and rendered all three defective and unacceptable for filing). See, also, Portland Cellular Partnership, 2 FCC Rcd 5586, 5587 & Paras. 8-9 (MSD 1987), aff'd 4 FCC Rcd 2050 (FCC 1989) (waiver of Sec. 22.921 denied for cross-ownerships between 1% and 17.12% of multiple applicants by passive investors); Henry County Telephone Company, et al., Mimeo No. 2747, File No. 34178-CL-P-098-B-84 (CCB, released February 21, 1986) (waiver of Sec. 22.921 denied for cross-ownerships of more than 1% in two or more applicants).

As the Commission itself has observed, its purpose in initially adopting the 1 percent cross-ownership rule "was to protect the integrity of the lottery process by precluding an applicant from participating in more than one application for a cellular license." Cellular Radio Service (Lottery Selection), 58 R.R.2d (P&F) 677, 693 (FCC 1985). (Emphasis added). Indeed, the Commission has emphasized its intention to carefully scrutinize applicants for attempts to circumvent the 1% limitation, and it flatly decreed that "We

will not allow parties who attempt to circumvent our lottery procedures to obtain a cellular license." Id. at 693 & n. 68. (Emphasis added).

Under these circumstances, there can be no question that TDS willfully acquired a prelottery 3.5% interest in the Settlement Group for the Wisconsin 8 RSA, while at the same time maintaining a 100% interest in its own application for the same market. Therefore, TDS' application in File No. 10209-CL-P-715-B-88, which was selected in the lottery for the Wisconsin 8 RSA on March 15, 1989, is defective for violation of Section 22.921 of the rules and may not lawfully be granted.

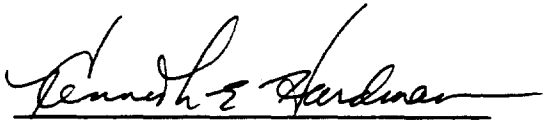
Finally, Century also points out that under Section 1.65 of the rules, TDS was required to timely report substantial and significant changes in the information furnished in its application to the Commission. Plainly, the acquisition of a prelottery cross-ownership interest greater than 1% in another application in the same market constitutes precisely the type of change for which the requirements of Section 1.65 were designed.

Nonetheless, despite two amendments to its application subsequent to the March 15, 1989 lottery, TDS has never informed the Commission of this (disqualifying) change. Accordingly, its failure to comply with Section 1.65 of the rules provides an independent reason that TDS' application is defective and must be dismissed.

WHEREFORE, Century Cellunet, Inc. respectfully submits that the captioned application of Telephone and Data Systems, Inc. is defective and may not lawfully be granted, and accordingly prays that the application be dismissed forthwith and that another lottery be promptly conducted for the Wisconsin 8 - Vernon Rural Service Area.

Respectfully submitted,

CENTURY CELLUNET, INC.

By 
Kenneth E. Hardman

1200 - 29th Street, N.W.
Washington, D.C. 20007
Telephone: 337-5700

Its Attorney

July 27, 1989

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Petition to Dismiss or Deny and all attachments and exhibits upon Telephone and Data Systems, Inc. by mailing a true copy thereof, first class postage prepaid, to its attorney, Peter M. Connolly, Esquire, Koteen & Naftalin, 1150 Connecticut Avenue, N.W., Washington, D.C. 20036.

Dated at Washington, D.C., this 27th day of July, 1989.


Kenneth E. Hardman